IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

INCOME TAX REFERENCE No 249 of 1993

For Approval and Signature:

Hon'ble MR.JUSTICE M.S.SHAH
and
Hon'ble MR.JUSTICE K.A.PUJ

==========

1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? :

COMMISSIONER OF INCOME-TAX

Versus

DIPAK CONSTRUCTION CO

Appearance:

1. INCOME TAX REFERENCE No. 249 of 1993

MR MANISH R BHATT for Petitioner No. 1

MR MANISH K KAJI for Respondent No. 1

CORAM : MR.JUSTICE M.S.SHAH
and
MR.JUSTICE K.A.PUJ

Date of decision: 18/07/2002

ORAL JUDGEMENT

(Per : MR.JUSTICE K.A.PUJ)

At the instance of the applicant-revenue, the following question of law is referred for the opinion of

this Court :-

"Whether, on the facts and in the circumstances of the case, the Tribunal was right in law in cancelling the penalty imposed by the I.T.O. under Section 271(1)(a) of the I.T. Act, 1961 ?"

2. The assessment year involved is Assessment Year 1983-84 for which the accounting year ended on 31.12.1982. The respondent-assessee is a partnership firm and it has filed its return on 30.10.1984 declaring total income of Rs.1,27,828/-. Thereafter the assessee has filed revised return of income declaring total income of Rs.2,27,824/-. The Income-tax Officer has assessed the total income of the assessee at Rs.2,35,760/-. The tax payable on the assessed income was determined at Rs.46,840/-. The assessee has paid the tax by way of TDS of Rs.60,492/- and hence the assessment has resulted into refund of Rs.13,652/-.

3. While finalizing the assessment, the Income-tax Officer has also initiated penalty proceedings under Section 271(1)(a) of the Act for late filing of the income-tax return. The assessee has pleaded before the Income-tax Officer that no penalty should be levied because the return was filed under Amnesty Scheme and also because TDS exceeded the assessed tax and the assessment has resulted into refund. The Income-tax Officer did not accept the submission of the assessee and levied penalty of Rs.42,656/- under Section 271(1)(a) of the Act.

4. Being aggrieved by the said order, the assessee preferred an appeal before the Commissioner of Income-tax (Appeals). The commissioner of Income-tax (Appeals) has held that the return was not under the Amnesty Scheme and it was further held by him that mere fact that the TDS exceeded the assessed tax would not be a ground for not levy of penalty. He has further observed that since there was no reasonable cause for delay, the assessee was to be treated as unregistered firm and the tax payable by unregistered firm was to be taken into account. He, therefore, confirmed the order passed by the Income-tax Officer levying penalty under Section 271(1)(a) of the Act.

5. The assessee thereafter took the matter further before the Income-tax Appellate Tribunal and the Tribunal has cancelled the penalty for the reasons stated in its order.

In the above premises, at the instance of the revenue, the above question is referred to this Court for its opinion.

6. Heard Mr Manish R Bhatt, the learned senior standing counsel appearing for the revenue and Mr Manish K Kaji, the learned advocate appearing for the respondent-assessee.

7. At the time of hearing of this reference, Mr Bhatt has invited out attention to the decision dated 18.9.2001 of this Court in Income-tax Reference No. 34 of 1986 which deals with an identical question which arose in the present reference. Amongst several questions referred to this Court, one of the questions was whether the finding of the Tribunal that on completion of assessment in the status of a registered firm, the assessee was entitled to a refund and hence no penalty leviable, is correct in law. While dealing with this question, this Court has referred to the decisions of this Court in CIT vs. M/s Damjibhai & Bros. 1976 CTR (Guj.) 23 and CIT vs. M/s Jashbhai Motibhai & Co., ITR No. 205 of 1975 decided on 26.2.1979. In light of the ratio laid down in the said decisions, this Court has taken the view that the Tribunal was not justified in holding that merely because on completion of assessment of the assessee in status of a registered firm a refund was due to the assessee, no penalty was leviable. However, this Court has further observed that the assessee-firm would incur a liability provided there is no reasonable cause which prevented it from filing the return in time.

8. Following the aforesaid decision, we have taken the view in Income-tax Reference No. 6 of 1993 decided on 17.7.2002 that the Tribunal was not right in law in cancelling the penalty imposed by the Income-tax Officer under Section 271(1)(a) of the Act merely because the assessment has resulted into refund. Mr Bhatt, the learned senior standing counsel has, therefore, urged before us that following the aforesaid two decisions, the Tribunal's order may be reviewed and that the penalty under Section 271(1)(a) of the Act may be held to be justified.

9. Mr Manish K Kaji, the learned advocate appearing for the respondent-assessee has submitted before us that the authorities below had not considered the fact as to whether even after treating the firm as unregistered firm for the purpose of levy of penalty, whether tax paid exceeded the amount of tax payable on the assessed

income. He has further submitted that here in the present reference, the tax payable on the assessed income was determined at Rs.46,840/- and the tax paid by way of TDS by the assessee was of Rs.60,492/- and hence admittedly it was a case of refund of Rs.13,652/-. However, neither party was in a position to state before us as to how much amount shall be payable even if the firm is treated as unregistered firm and whether the assessment would be resulted into refund or not. Mr Kaji has further invited our attention to the decision of the Supreme Court in 169 ITR 221 which was in respect of charging of interest and he has further submitted that following the said decision, even in the case of penalty the view was taken by Madras, Calcutta and Rajasthan High Courts that no penalty was leviable in case where the assessment had resulted into refund.

10. We have heard and considered the arguments of both the sides. However, we are of the view that in an identical situation, the same view was taken by this Court in Income-tax Reference No. 34 of 1986 and also in Income-tax Reference No. 6 of 1993. Following the said view, we hold that the Tribunal was not justified in cancelling the penalty levied by the Income-tax Officer under Section 271(1)(a) of the Act. However, we make it clear that since the proper facts are not before us with regard to the calculation of tax even in case the firm was to be treated as URF and in that case also whether the assessment has resulted into refund. We, therefore, direct the Income-tax Appellate Tribunal to examine this point in light of the observations made by us. We further make it clear that the point whether the assessee was prevented by reasonable cause or not was also not considered by the authorities below. We, therefore, direct the Tribunal to examine the issue as to whether the assessee-firm would incur a liability or not and whether the assessee was prevented by reasonable cause.

11. Subject to the aforesaid observations, we answer the question referred to us in the negative i.e. in favour of the revenue and against the assessee.

The reference is disposed of accordingly with no order as to costs.

(M.S. Shah, J.) (K.A. Puj, J.)

sundar/-